Supreme Court, U.S.
F I L E D
061321 MAR 30 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

MYRNA GOMEZ-PEREZ,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

EDELMIRO A. SALAS GONZÁLEZ
Urb. Villa Nevarez
1072 Calle 17
San Juan, Puerto Rico 00927
(787) 376-4659

JOSEPH R. GUERRA*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JOSÉ L. RAMÍREZ DE LEÓN
Urb. Hyde Park
1000 Ave. Munoz Rivera
Suite 304
San Juan, Puerto Rico 00927
(787) 763-0879

Counsel for Petitioner

March 30, 2007

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits retaliation against employees who complain of age discrimination.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *JACKSON* v. *BIRMINGHAM BOARD OF EDUCATION*	7
II. THE DECISION BELOW CONFLICTS WITH THE RULING OF THE D.C. CIRCUIT	13
III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Bornholdt v. *Brady*, 869 F.2d 57 (2d Cir. 1989) 13
Canino v. *United States EEOC*, 707 F.2d 468 (11th Cir. 1983) 18
Davis v. *Passman*, 442 U.S. 228 (1979) 10
Forman v. *Small*, 271 F.3d 285 (D.C. Cir. 2001) ..... *passim*
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) ..... *passim*
Lorillard v. *Pons*, 434 U.S. 575 (1978) 16
Miller v. *United States*, 813 F.2d 402 (4th Cir. 1986), *available at* 1986 WL 16231 13
Porter v. *Adams*, 639 F.2d 273 (5th Cir. 1981) 18
Scott v. *Potter*, 182 F. App'x 521 (6th Cir. 2006) 14
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 6
Villescas v. *Abraham*, 311 F.3d 1253 (10th Cir. 2002) 14
White v. *GSA*, 652 F.2d 913 (9th Cir. 1981) 18

STATUTES AND REGULATION

29 U.S.C. § 158(a)(1) 18
§ 215(a)(3) 18
§ 623 ..... 14, 16
§ 633a 1, 2, 16, 18
§ 660(c)(1) 18
§ 1140 18
§ 2615(a) 18
38 U.S.C. § 4311(b) 18
39 U.S.C. § 401(1) 4
42 U.S.C. § 2000e-3(a) 18
§ 12203 18
29 C.F.R. § 1614.101 19

TABLE OF AUTHORITIES—continued

LEGISLATIVE HISTORY Page

S. Rep. No. 95-493 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504 17

H.R. Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.S.C.A.N. 2811 17

OTHER AUTHORITIES

Corporate Facts: Wal-Mart By the Numbers, *at* http://www.walmartfacts.com/FactSheets/3142007_Corporate_Facts.pdf (visited Mar. 29, 2007) 19

U.S. Census Bureau, *Compendium of Public Employment: 2002* (Sept. 2004) 19

PETITION FOR A WRIT OF CERTIORARI

Myrna Gomez-Perez hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in *Gomez-Perez* v. *Potter*, 476 F.3d 54 (Feb. 9, 2007).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit is reported at 476 F.3d 54 and is reproduced at Petitioner's Appendix ("Pet. App.") 1a-10a. The opinion of the court of appeals denying the petition for rehearing and rehearing en banc, dated March 20, 2007, is reproduced at Appendix 33a. The opinion of the United States District Court for the District of Puerto Rico, dated Feb. 28, 2006, is unreported and is reproduced at Appendix 11a-32a.

JURISDICTION

The opinion and judgment of the court of appeals were issued on February 9, 2007. A timely petition for rehearing and rehearing en banc was denied on March 20, 2007. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit had jurisdiction of this case pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISION INVOLVED

The federal-sector provision of the Age Discrimination in Employment Act mandates that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in specified departments and agencies of the Federal Government "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). This provision is set forth in full at Appendix 34a-37a.

INTRODUCTION

This case presents the question whether the federal-sector provision of the Age Discrimination in Employment Act ("ADEA") prohibits retaliation against federal employees who complain of age discrimination. The court of appeals held that it does not. In so ruling, it disregarded this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and created a square and acknowledged conflict with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001).

When it extended the ADEA to the federal sector, Congress did not simply subject federal agencies to the same provisions that govern private employers. Instead, Congress drafted a broad, stand-alone provision, which states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).

In *Jackson*, this Court held that, as a matter of plain meaning, a virtually identical phrase in Title IX—"discrimination" "on the basis of" sex—encompasses retaliation against those who complain of sex discrimination. The Court explained that, even though Congress expressly barred retaliation in Title VII and did not mention it in Title IX, this discrepancy provided no basis for narrowing Title IX's plain meaning. Congress's decision to supplement detailed and differently worded proscriptions in Title VII's private employer provisions, the Court ruled, said nothing about the scope of Title IX's more broadly worded prohibition.

Jackson thus ratified the reasoning the D.C. Circuit had used in concluding that § 633a(a) bars retaliation. Like the *Jackson* Court, the D.C. Circuit recognized that, by its plain terms, a broadly worded prohibition on "any discrimination based on age" prohibits "a reprisal for an age discrimination

charge." *Forman*, 271 F.3d at 296 (internal quotation marks omitted). And, like the *Jackson* Court, the D.C. Circuit refused to limit § 633a(a)'s broad prohibition based on the express retaliation ban in the ADEA's private employer provisions. The latter provisions—which were modeled on Title VII's private employer provisions—were "narrowly drawn," and thus, unlike the sweeping language of § 633a(a), they would not bar retaliation without an express prohibition. *Id.*

Despite these precedents, the First Circuit ruled in this case that § 633a(a) does not prohibit retaliation. In so ruling, the First Circuit employed reasoning that is flatly inconsistent with this Court's decision in *Jackson*. The First Circuit's holding also creates a square and irreconcilable conflict with the D.C. Circuit's decision in *Forman*. This Court's intervention is necessary to bring the First Circuit into conformity with *Jackson*, to resolve the conflict between the circuits, to effectuate Congress' objective of eradicating age discrimination from the federal workplace, and to ensure that the thousands of federal employees working in the jurisdictions covered by the First Circuit enjoy the protection from retaliatory age discrimination that Congress provided for in § 633a and that federal employees working in the nation's capital possess.

STATEMENT OF THE CASE

On February 22, 2003, petitioner Myrna Gomez-Perez, a 45-year-old window distribution clerk in the Moca, Puerto Rico Post Office, filed an equal employment opportunity ("EEO") complaint against the United States Postal Service ("USPS"). In that complaint, petitioner alleged that she had been discriminated against on the basis of her age when her supervisor denied her request for a transfer from her part-time position in the Moca Post Office to the full-time position she previously held in the Dorado Post Office.

After filing her EEO complaint, petitioner, who previously had an exemplary 15-year record with the USPS, was subjected to a series of reprisals. She was called to meetings at which groundless charges of sexual harassment were leveled against her. She was harassed and mocked by co-workers. USPS posters concerning sexual harassment were defaced and her name was written on them. And her hours were drastically reduced.

On November 18, 2003, petitioner filed the instant case, alleging, *inter alia*, that respondent had violated § 633a(a) of the ADEA by retaliating against her for filing an age discrimination complaint. Respondent moved for summary judgment. The district court, adopting the report and recommendation of a magistrate judge, granted respondent's motion on the ground that the ADEA did not waive the USPS's sovereign immunity with respect to retaliation claims.

The court of appeals affirmed, though on different grounds. It held that the USPS's "sue and be sued clause," 39 U.S.C. § 401(1), waived the agency's sovereign immunity, but that § 633a(a) does not provide "a cause of action for retaliation as the result of having filed an age-discrimination related complaint." Pet. App. 10a.

In support of the latter conclusion, the court of appeals offered essentially three reasons. First, the court believed that "the plain text of § 633a" did not prohibit retaliation. Pet. App. 4a-5a. Disregarding *Jackson*'s analysis of virtually identical statutory language, the First Circuit reasoned that § 633a(a) "clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." *Id.* at 5a. The question, according to the court of appeals, is whether Congress meant "'discrimination *and retaliation*' when it said 'discrimination'?" *Id.*

Second, the court reasoned that a cause of action for retaliation is distinct from a cause of action for discrimination. "The clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress had meant to provide for both causes of action, it would have said so explicitly in § 633a." Pet. App. 5a.

Third, the court drew a negative inference from 29 U.S.C. § 623, the ADEA provision governing private employers. Because § 623(d) provides an explicit cause of action for retaliation, whereas § 633a(a) merely prohibits "any discrimination based on age," the court concluded that "Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 7a-8a.

The court rejected petitioner's argument that this Court's decision in *Jackson* required a different result, deeming *Jackson* inapposite for three reasons. First, the court thought it significant that, "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," whereas here the court was "constrained by the fact that Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." Pet. App. 6a. In so reasoning, the First Circuit ignored *Jackson*'s express recognition that, even though the private right of action under Title IX had been judicially implied, the scope of the substantive prohibition that is enforced in such an action is defined by the statute's text.

Second, the court asserted that *Jackson* was premised in part on the fact that, in the Title IX context, a retaliation cause of action is necessary to protect teachers and coaches, who are often in the best position to identify and report discrimination. Pet. App. 6a-7a. Federal employees such as petitioner, the court surmised, "can hardly argue that their coworkers are often in the best position to identify instances of age discrimination and bring it to the attention of [their] supervisors." *Id.* at 7a. This distinction, however, addresses a

separate holding in *Jackson* that did not concern whether the phrase "discrimination" "on the basis of" a protected status prohibited retaliation, but rather whether such a prohibition extended to persons outside the protected class.

Third, the court claimed that Congress passed Title IX "in response to" *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which this Court upheld a cause of action for retaliation for speaking out against race discrimination. Pet. App. 7a. Here, the court of appeals found "no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." *Id.* *Jackson*, however, did not rely on Title IX's legislative history, but rather on a presumption of congressional intent that is no less applicable to § 633a than it was to Title IX.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below conflicts with this Court's decision in *Jackson* and the D.C. Circuit's decision in *Forman* on an important issue of federal law.

In *Jackson*, this Court held that Title IX's broadly worded proscription of "discrimination" "on the basis of sex" encompasses retaliation against those who complain of sex discrimination, even though Title IX does not specifically refer to retaliation. This is so, the Court concluded, because retaliation against those who complain of sex discrimination is itself a form of sex discrimination and thus falls within the statute's general proscription of "discrimination" "on the basis of sex."

In this case, the court of appeals held that the ADEA's public-sector provision, which prohibits "discrimination based on age," does not encompass retaliation against those who complain of age discrimination. This is so, the court

concluded, because § 633a refers only to "discrimination," not to "retaliation," and discrimination and retaliation are distinct wrongs for which Congress must provide distinct causes of action. There is thus an unmistakable and inescapable conflict between this Court's interpretation of Title IX in *Jackson* and the court of appeals' interpretation of § 633a(a)'s essentially identical language. The various reasons the court of appeals gave for distinguishing *Jackson* are entirely without merit. This Court should grant the petition to rectify the court of appeals' disregard of *Jackson*.

The court below also refused to follow the D.C. Circuit's decision in *Forman*, thus creating a square conflict between the rule governing federal employees in the First Circuit and the rule governing federal employees in the nation's capital. Given the interest in uniform treatment of federal employees, as well as Congress' strong policy of eradicating age discrimination from the federal workplace, the Court should grant the petition to resolve the conflict among the circuits and announce a clear and uniform rule prohibiting the federal government from retaliating against those who complain of age discrimination.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *JACKSON* v. *BIRMINGHAM BOARD OF EDUCATION*.

The decision below cannot be reconciled with this Court's decision in *Jackson*. There, the Court held that Title IX of the Civil Rights Act of 1964, which prohibits recipients of federal education funding from engaging in "discrimination" "on the basis of sex," prohibits retaliation against those who complain of sex discrimination. The Court noted that Title IX does not contain a separate prohibition on retaliation, but concluded that an express reference to retaliation was unnecessary because *retaliation against those who complain of sex discrimination is itself a form of sex discrimination*:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

544 U.S. at 173-74 (citations omitted).

The Court's interpretation of the words "discrimination" "on the basis of sex" in *Jackson* plainly controls here. The language of § 633a(a) is in all relevant respects identical to that of Title IX. There is no meaningful difference between a provision that bars "discrimination based on" a protected status and one that proscribes "discrimination" "on the basis of" a protected status.

Similarly, the absence of a separate and express prohibition on retaliation in § 633a(a) is no more reflective of a congressional intent not to prohibit retaliation than the absence of such an express prohibition was in Title IX. As in the case of Title IX, there was no need for Congress to prohibit retaliation expressly because *retaliation against those who complain of age discrimination is itself a form of age discrimination*. Retaliation against those who complain of age discrimination is "discrimination" because the complainant is being subjected to differential treatment. And retaliation is discrimination "based on age" because it is an intentional response to the nature of the complaint: an allegation of age discrimination. Thus, when an employer

retaliates against a person because she complains of age discrimination, this constitutes "discrimination based on age."

The court of appeals took no account of *Jackson*'s core holding that, as a matter of plain language, a prohibition on "discrimination" "on the basis of" a protected status prohibits retaliation against those who complain of such discrimination. Instead, the court began with precisely the opposite assumption—that retaliation is *not* a form of discrimination, but a separate and distinct wrong for which Congress must provide a separate and distinct cause of action. See Pet. App. 5a (§ 633a(a) "clearly prohibits discrimination" but "says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation"). This assumption reflects a fundamental misunderstanding of *Jackson* at best, and a flagrant disregard of *Jackson* at worst. After *Jackson*, it is simply not possible to maintain, as a matter of textual analysis, that a broad prohibition on discrimination "says nothing" about retaliation.

Instead of coming to terms with *Jackson*'s interpretation of the word "discrimination," the court of appeals brushed *Jackson* aside, arguing that *Jackson* is distinguishable on a variety of grounds. None of the lower court's purported distinctions, however, survives even cursory scrutiny.

First, the court of appeals found it significant that "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," and that "[t]he Court is the primary entity involved in defining the contours of that right of action." Pet. App. 6a (internal quotation marks and alterations omitted). Here, however, "Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." *Id.*

This reasoning is twice flawed. As an initial matter, it begs the question at issue—whether the express cause of action Congress provided in § 633a includes a cause of action for retaliation. More fundamentally, the court's distinction rests

on the erroneous notion that the scope of a statute's substantive prohibition depends on whether the cause of action for its enforcement is express or implied. While courts that imply a private right of action exercise law-making power in the sense that they create the right "to invoke the power of the court" to enforce that right, *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979) (defining a "cause of action"), the scope of the right that is enforced in a judicially-created cause of action is still defined by the statute itself. Determining the scope of that statutory right is thus an exercise in statutory interpretation—not an exercise of the judiciary's limited lawmaking power. Accordingly, the Court explained in *Jackson* that in "all of" the cases in which it has determined the scope of Title IX's prohibition, it "relied on the text of Title IX." 544 U.S. at 173. And that is what the Court did in *Jackson*. *See id.* at 175 ("'Discrimination' is a term that covers a wide ride of intentional unequal treatment; by using such a broad term, *Congress* gave the statute a broad reach.") (emphasis added); *id.* at 178 ("We reach this result based on the statute's text."). Thus, any distinction between § 633a(a) and Title IX must rest on the language that defines the statutes' substantive prohibitions, not on the express or implied nature of the causes of action that can be invoked to enforce those prohibitions. The lower court did not, because it could not, identify any meaningful difference between a statute that prohibits "discrimination" "on the basis of" a protected status and one that prohibits "discrimination based on" a protected status.

The court of appeals' second reason for distinguishing *Jackson* is equally untenable. The lower court asserted that

> the Supreme Court premised its holding in *Jackson* partially on the fact that Title IX prohibits discrimination in educational institutions, and that a retaliation cause of action would protect "teachers and coaches," who themselves were not the targets of discrimination, but who "are often in the best position to vindicate the rights

> of their students because they are better able to identify discrimination and bring it to the attention of administrators."

Pet. App. 6a-7a (quoting *Jackson*, 544 U.S. at 181). This rationale, the court concluded, does not apply here, because "employees such as Gómez can hardly argue that their co-workers are often in the best position to identify instances of age discrimination and bring it to the attention of supervisors." *Id.* at 7a.

This purported distinction of *Jackson* is demonstrably incorrect. Even accepting the court of appeals' assertion that the federal employees protected by § 633a(a) are in a better position to identify and report discrimination than students protected by Title IX, that fact provides no support for the court's distinction. *Jackson*'s discussion of teachers' and coaches' ability to identify and report discrimination was addressed to a *separate holding* in *Jackson*, a holding that is wholly irrelevant to the question presented here. In *Jackson*, the school board argued that, even if Title IX barred retaliation, that bar could not be invoked by a third-party, such as the male coach in that case, who was not the "victim of the discrimination that [was] the subject of the original complaint." 544 U.S. at 179. The Court rejected this argument, concluding that a bar on such third-party actions would frustrate the statute's purpose because it would discourage those in the best position to identify and report discrimination from doing so.

Thus, the discussion in *Jackson* that the court of appeals relied upon to distinguish that case was addressed to the issue of *who* may bring a retaliation claim, not whether retaliation is actionable in the first place. In concluding that retaliation is actionable under Title IX, *Jackson* did not rely on the need for third-party complaints, but instead found that the statute's proscription of "discrimination" "on the basis of sex" prohibited retaliation by its "clear terms." *Id.* at 183. This is the relevant rationale from *Jackson*, and it is fully applicable

to § 633a(a)'s materially indistinguishable language. The question whether a third party can bring an action for retaliation under § 633a is not presented here because, unlike the complainant in *Jackson*, petitioner is a member of the protected class and was the victim of the discrimination that was the subject of the original complaint. Accordingly, the court of appeals' second distinction, like its first, is utterly without merit.

The court's third ground for distinguishing *Jackson* fares no better. The court deemed *Jackson* inapposite because the Court stated in *Jackson* that Title IX was adopted "in response to the Court's holding in *Sullivan* . . . in which the Court upheld a cause of action for retaliating for speaking out against race discrimination." Pet. App. 7a (citation omitted). Here, by contrast, "there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." *Id.*

The fundamental flaw in this argument is that *Jackson* did not say that Title IX was adopted "in response to" *Sullivan*. It stated that Title IX was enacted "just three years after *Sullivan* was decided, and accordingly that decision provides a valuable *context* for understanding the statute." *Jackson*, 544 U.S. at 176 (emphasis added). This Court cited no evidence from Title IX's legislative history showing that Congress was actually aware of *Sullivan*; it simply cited an earlier decision for the proposition that it was "realistic to presume" that Congress was aware of the then three-year old *Sullivan* decision. *Jackson*, 544 U.S. at 176 (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)). The absence of references in the ADEA's legislative history to retaliation against federal workers thus provides no basis for distinguishing *Jackson*. To the contrary, *Jackson*'s "contextual" analysis applies to § 633a. Just as it is reasonable to presume that the 1972 Congress that enacted

Title IX was aware of a 1969 Supreme Court decision holding that retaliation is a form of discrimination, it is reasonable to presume that the 1974 Congress that enacted § 633a had the same awareness, and that it used the phrase "discrimination based on" a protected status to encompass the same types of conduct (including retaliation) that are encompassed by the virtually identical language of Title IX.

In short, the lower court's various distinctions cannot blunt the precedential force of *Jackson* here. *Jackson* holds that, by its plain terms, a statute that prohibits "discrimination" "on the basis of" a protected status prohibits retaliation against those who complain of such discrimination. The court of appeals ignored this holding and papered over *Jackson* with illusory distinctions. This Court should grant the petition to compel compliance with *Jackson* and to ensure that petitioner and other federal employees in the First Circuit are afforded the full measure of protection from age discrimination that Congress both intended and provided for in § 633a.

II. THE DECISION BELOW CONFLICTS WITH THE RULING OF THE D.C. CIRCUIT.

In addition to conflicting with this Court's decision in *Jackson*, the decision below creates a square conflict with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001). In *Forman*, the D.C. Circuit held that § 633a creates a cause of action for retaliation. *Id.* at 295-99. The court below expressly refused to follow *Forman*. Pet. App. at 8a ("We must respectfully disagree with our brethren on the D.C. Circuit").[1]

---

[1] Four other circuits have recognized the question whether § 633a prohibits retaliation, and three have indicated their agreement with the result reached in *Forman*. The Second and Fourth Circuits have suggested in dicta that § 633a prohibits retaliation. *See Bornholdt* v. *Brady*, 869 F.2d 57, 62 (2d Cir. 1989) ("it may be inferred that the breadth of the language of § 633a . . . is sufficiently broad to prohibit age-related retaliation"); *Miller* v. *United States*, 813 F.2d 402 (4th Cir. 1986) (per

The core of the disagreement between the D.C. Circuit and the court below is the meaning of § 633a(a)'s mandate that personnel decisions affecting covered federal employees be made "free from any discrimination based on age." As discussed *supra*, the court below assumed, in defiance of *Jackson*, that retaliation for filing an age discrimination complaint is not itself a form of "discrimination based on age." Pet. App. 5a ("The question is, did Congress mean 'discrimination *and retaliation*, when it said 'discrimination'?"). The D.C. Circuit, by contrast, correctly concluded, in reasoning that would later be echoed in *Jackson*, that the "sweeping" and "unqualified" language Congress used in § 633a(a) "encompasses a claim of retaliation because 'analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor.'" *Forman*, 271 F.3d at 296 (quoting *Siegel* v. *Kreps*, 654 F.2d 773, 782 n.43 (D.C. Cir. 1981) (Robinson, J., concurring in part and dissenting in part)).

The courts also disagree about the inference to be drawn from the ADEA's private sector provision, 29 U.S.C. § 623, which provides a distinct cause of action for retaliation.[2] The

---

curiam) (unpublished), *available at* 1986 WL 16231, at *2 ("it seems clear that analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor"). The Tenth Circuit "has assumed the existence of . . . a cause of action" for retaliation under § 633a. *Villescas* v. *Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002). And the Sixth Circuit has noted both the question and the conflicting decisions it has produced. *See Scott* v. *Potter*, 182 F. App'x 521, 523 n.1 (6th Cir. 2006) ("There is a question . . . whether the federal government has waived sovereign immunity to claims of age-related retaliation by its employees. Courts have differed on the answer.").

[2] Section 623(d) provides that

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

court below reasoned that "[t]he absence of statutory language providing a claim for retaliation in § 633a(a), when compared with the explicit prohibition on retaliation in § 623(d), further supports the conclusion that Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 8a. The D.C. Circuit, by contrast, found that "[n]othing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace." *Forman*, 271 F.3d at 297. Instead, the D.C. Circuit concluded that the presence of a distinct cause of action for retaliation in the private-sector provision is not probative of the meaning of the federal-sector provision because the latter is a broadly-worded, stand-alone provision, whereas the former is a narrowly drawn provision that spells out the prohibited conduct in detail. See *id.* at 296 ("Unlike § 623, which is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment, Congress used sweeping language when it subsequently extended the ADEA to cover federal agency employees.").

Significantly, *Jackson* ratified the D.C. Circuit's reason for refusing to draw a negative inference from the presence of an express retaliation provision in the ADEA's private-sector provision. In *Jackson*, the Court refused to draw a negative inference from the presence of an express retaliation provision in Title VII. The Court explained that, while Title IX "is a broadly written general prohibition on discrimination," Title VII's private employer provisions "spell[] out in greater detail the conduct that constitutes discrimination in violation of that statute." *Jackson*, 544 U.S. at 175. Thus, the fact that Congress separately prohibited retaliation in the private employer provisions of Title VII did not show that Title IX's more broadly worded prohibition failed to prohibit retaliation. *Id.* ("Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to

mention one such practice does not tell us anything about whether it intended that practice to be covered."). *Jackson* makes clear that negative inferences cannot be drawn based upon comparisons between substantive prohibitions of very different scope.

This reasoning applies with particular force here. The ADEA's prohibitions on private employers "were derived *in haec verba* from" the private employer provisions of Title VII, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), and spell out the prohibited conduct in detail. Section 633a(a), by contrast, contains a broad prohibition virtually identical to Title IX's. What was true in *Jackson* is no less true here—because Congress did not list any specific discriminatory practices when it wrote § 633a, its failure to mention one such practice does not imply anything about whether it intended that practice to be covered. The court of appeals' contrary conclusion is symptomatic of its pervasive failure to come to terms with *Jackson*.[3]

III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The question presented in this case involves an important issue of federal law. Congress has long recognized the importance of eliminating age discrimination in federal

---

[3] The logical fallacy in the court of appeals' "negative inference" theory is further illustrated by § 623(e), which prohibits age discriminatory advertisements and notices for private employment. *See* 29 U.S.C. § 623(e). Under the lower court's theory, the lack of such an express prohibition in § 633a means that it does not bar the use of discriminatory notices or advertisements. But § 633a plainly does prohibit such practices: they are "personnel actions" that (1) "affect[] . . . applicants for employment" over 40 and (2) are not "free from any discrimination based on age." *Id.* § 633a(a). Because a ban on discriminatory advertising is simply superfluous in light of § 633a(a)'s broad scope, it would be improper to conclude that the inclusion of such an express prohibition in the ADEA's private employer provisions but not in § 633a somehow limits the scope of § 633a(a). The same is true for retaliation.

employment. When Congress expanded the ADEA to the federal government in 1974, it emphasized that age discrimination can be as invidious as any other form of discrimination, and that it is especially harmful in the workplace:

> "Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and denies the Nation[] the contribution they could make if they were working."

H.R. Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.S.C.A.N. 2811, 2849.

Over the years, Congress has expanded the scope of § 633a. In 1978, for example, Congress eliminated the upper age limit for federal employees in order to end mandatory retirement in the federal sector. In so doing, Congress reiterated its strong policy that "as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age." S. Rep. No. 95-493, at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N 504, 506.

Clearly, Congress views age discrimination in the federal workplace as an important issue of federal law. Just as clearly, a ban on retaliation is essential to accomplish Congress' objective of eradicating age discrimination from the federal workplace. If, as the court of appeals held, § 633a does not prohibit retaliation, then § 633a would not, for example, prevent an employer from adopting an overt policy of firing anyone who filed an age discrimination complaint. It is inconceivable that Congress intended to permit such an

evasion of § 633a. As the D.C. Circuit observed, "[i]t is difficult to imagine how a workplace could be 'free from *any* discrimination based on age' if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee." *Forman*, 271 F.3d at 297.

That Congress views a ban on retaliation as essential to its effort to eradicate invidious discrimination in all of its guises is confirmed by the fact that every major federal anti-discrimination statute prohibits retaliation. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Family and Medical Leave Act, 29 U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).[4] There is no apparent reason why Congress would permit discriminatory retaliation in federal employment while banning it in every other context. Certainly, the court of appeals did not provide one.

Moreover, the Equal Employment Opportunity Commission ("EEOC")—the entity Congress expressly charged with enforcing § 633a[5]—has issued regulations confirming

---

[4] Like § 633a(a), not all of these statutes contain a distinct retaliation provision. The federal-sector provision of Title VII, for example, does not specifically refer to retaliation. But courts have had no trouble concluding that Title VII's cause of action for discrimination against federal employees includes retaliation. *See Porter* v. *Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981); *White* v. *GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (same); *Canino* v. *United States EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983) (same).

[5] *See* 29 U.S.C. § 633a(b) (authorizing the EEOC "to enforce the provisions of subsection (a)" and granting EEOC authority to "issue such

that § 633a prohibits retaliation. The EEOC's regulations affirm that "[i]t is the policy of the Government of the United States to provide equal opportunity in employment for all persons" and "to prohibit discrimination in employment because of . . . age." 29 C.F.R. § 1614.101(a). They also mandate that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by . . . the Age Discrimination in Employment Act." *Id.* § 1614.101(b) (citing as authority § 633a). The court of appeals did not even mention 29 C.F.R. § 1614.101.

Finally, the question presented in this case is important because of the inequitable disparities it creates within the federal employment sector. With more than 2.6 million employees (not including military personnel), the federal government is by far the nation's largest employer.[6] See U.S. Census Bureau, *Compendium of Public Employment: 2002*, at 12 tbl.9 (Sept. 2004). The rights and remedies afforded a federal employee faced with retaliatory age discrimination should not depend on where she happens to work. Accordingly, the Court should grant the petition to ensure that all federal employees enjoy the full measure of protection Congress granted them in § 633a, and to ensure that federal employees in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico possess the same rights and remedies as federal employees working in the nation's capital.

---

rules, regulations, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section").

[6] By contrast, Wal-Mart, the nation's largest private employer, has 1.3 million employees in the United States. *See* Corporate Facts: Wal-Mart By the Numbers, *at* http://www.walmartfacts.com/FactSheets/3142007_Corporate_Facts.pdf (visited Mar. 29, 2007).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDELMIRO A. SALAS GONZÁLEZ
Urb. Villa Nevarez
1072 Calle 17
San Juan, Puerto Rico 00927
(787) 376-4659

JOSEPH R. GUERRA*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JOSÉ L. RAMÍREZ DE LEÓN
Urb. Hyde Park
1000 Ave. Munoz Rivera
Suite 304
San Juan, Puerto Rico 00927
(787) 763-0879

Counsel for Petitioner

March 30, 2007

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 06-1614

MYRNA GÓMEZ-PÉREZ,
Plaintiff, Appellant,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Defendant, Appellee.

Heard Nov. 2, 2006
Decided Feb. 9, 2007

Before TORRUELLA, *Circuit Judge*, BALDOCK,* *Senior Circuit Judge*, and HOWARD, *Circuit Judge*.

TORRUELLA, *Circuit Judge*.

Myrna Gómez-Pérez ("Gómez") was a window distribution clerk for the United States Postal Service ("USPS"). Gómez alleges that she was subject to retaliatory treatment after filing an age discrimination complaint against her supervisors. She then filed suit against the USPS and John Potter ("Potter") in his capacity as Postmaster General, alleging, *inter alia*, violations of Section 15 of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a. The district court granted summary judgment to the USPS and Potter on Gómez's ADEA claim on the ground that the United States had not waived sovereign immunity as to retaliation claims under the ADEA. Gómez appeals from this

---

* Of the Tenth Circuit, sitting by designation.

decision. After careful consideration, we conclude that the USPS and Potter have waived sovereign immunity with respect to ADEA suits, but that Section 15 of the ADEA does not provide a cause of action for retaliation by federal employers.

I. *Background*

We briefly recount the facts relevant to Gómez's claim. Gómez began working for the USPS in New York in 1987. In 1995, Gómez was transferred to the Caribbean District, and began working in Puerto Rico. Gómez was working at the Dorado Post Office in October 2002 as a full-time window distribution clerk when she requested a transfer to the Moca Post Office in order to be closer to her mother, who was ill. Gómez's supervisor approved the transfer, and Gómez began working at the Moca Post Office as a part-time window distribution clerk. Approximately one month later, in November 2002, Gómez requested a transfer back to the Dorado Post Office as a full-time window distribution clerk. On the same day, Gómez's supervisor converted the Dorado window distribution clerk position to a part-time position and filled it with another employee. Gómez's supervisor denied Gómez's transfer request.

After filing a grievance (which was denied), Gómez filed an equal employment opportunity complaint with the USPS, alleging that she had been discriminated against on the basis of her age. Gómez was forty-five years old at the time. After Gómez filed her complaint, she alleges that she was subject to various forms of retaliation. Gómez alleges that her supervisor called her to meetings during which groundless complaints were leveled against her. In addition, Gómez alleges that USPS posters related to sexual harassment were defaced and that her name was written on the posters. Gómez also alleges that her supervisors complained that she was sexually harassing her co-workers, when in fact she was not. Gómez states that her co-workers began to harass her and tell her to

"go back where you belong." Finally, Gómez states that her work hours were drastically reduced after she filed the complaint.

Gómez filed suit against the USPS and Potter (in his official capacity) in the United States District Court for the District of Puerto Rico on November 11, 2003, alleging, *inter alia*, that she had been retaliated against for filing her EEO Complaint, and that this retaliation constituted a violation of the ADEA, 29 U.S.C. § 633a. On July 7, 2005, the USPS and Potter filed a motion for summary judgment. The court referred the matter to a magistrate judge, and on January 30, 2006, the magistrate judge issued a report and recommendation that the motion for summary judgment be granted on the grounds that the United States had not waived sovereign immunity for retaliation suits under the ADEA. Gómez filed an objection to the report and recommendation, but the district court adopted it and granted summary judgment to the USPS and Potter on February 28, 2006. Gómez now appeals from the grant of summary judgment.

II. *Discussion*

We review a grant of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmovants. *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir.2006). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

A. Sovereign Immunity

The United States is entitled to immunity from suit without its consent. *Muirhead v. Mecham*, 427 F.3d 14, 17 (1st Cir.2005); *see also United States v. Horn*, 29 F.3d 754, 761-62 (1st Cir.1994) (discussing the historical background of sovereign immunity). Although the USPS is independent from the executive branch, the Supreme Court has held that the Postal Service enjoys the federal government's immunity

from suit because of its significant government powers. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 126 S.Ct. 1252, 1255-56, 163 L.Ed.2d 1079 (2006). Potter, in his official capacity as Postmaster General, enjoys similar immunity. *See Loeffler v. Frank*, 486 U.S. 549, 562 n. 8, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988) ("Whenever the head of the Postal Service acts in his official capacity, he is acting in the name of the Postal Service. Thus, here . . . the acts of the named defendant are always chargeable as acts of the person or entity subject to the [waiver of immunity]."). Therefore, in order for Gómez to bring suit against the USPS and Potter, we need to find an "unequivocal" waiver of immunity that is expressed in "specific" statutory language. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). The Postal Reorganization Act, however, generally "waives the immunity of the Postal Service from suit by giving it the power 'to sue and be sued' in its official name." *U.S. Postal Serv. v. Flamingo Indus. Ltd.*, 540 U.S. 736, 744, 124 S.Ct. 1321, 158 L.Ed.2d 19 (2004) (quoting 39 U.S.C. § 401(1)). Accordingly, sovereign immunity does not present a bar to bringing an ADEA suit against the USPS or Potter.

B. Substantive Cause of Action

Our inquiry does not end here. As the Supreme Court stated in *Flamingo Industries*, once we have determined that sovereign immunity has been waived, we must proceed to determine whether "the substantive law in question is . . . intended to reach the federal entity." *Id.* Thus, we must determine whether Congress intended for the ADEA's prohibition on "discrimination based on age" to allow a plaintiff to bring a cause of action against the federal government for retaliation.

We begin with the plain text of § 633a; we "presume that a legislature says in a statute what it means and means in a

statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Section 633a(a) states: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." The text of § 633a clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint. The question is, did Congress mean "discrimination *and retaliation*" when it said "discrimination"?

The difference between these two causes of action is clear, and was recently explained in the context of Title VII by the Supreme Court in *Burlington N. & Santa Fe Ry. v. White*:

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

— U.S. —, 126 S.Ct. 2405, 2412, 165 L.Ed.2d 345 (2006) (internal citations omitted). The clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress had meant to provide for both causes of action, it would have said so explicitly in § 633a.

Gómez responds that, notwithstanding the differences between discrimination and retaliation, the Court also recently held in *Jackson v. Birmingham Bd. of Educ.*, that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX." 544 U.S. 167, 174, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (emphasis omitted). Gómez argues that the logic the Court used in *Jackson* to find that a retaliation cause of action could be implied from a statute which prohibited only "discrimination" is equally applicable to the ADEA: retaliation is an intentional act, it is discriminatory in that it treats the complainant differently than others, and it is discrimination "based on" age because the nature of the complaint (for which the defendant is retaliating) is age discrimination. *Id.* at 173-74, 125 S.Ct. 1497.

We are not persuaded by this argument. First, we note that in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX of the Civil Rights Act of 1964. *Id.* at 173, 125 S.Ct. 1497 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 690-93, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). The Court is the primary entity involved in "defin[ing] the contours of that right of action." *Jackson*, 544 U.S. at 173, 125 S.Ct. 1497. Here, we are constrained by the fact that Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action. The Court specifically noted this difference in *Jackson* when rejecting comparisons between Title IX and Title VII. *Id.* at 175, 125 S.Ct. 1497 ("Title IX is a broadly written general prohibition on discrimination. . . . By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination."). In addition, the Supreme Court premised its holding in *Jackson* partially on the fact that Title IX prohibits discrimination in educational institutions, and that a retaliation cause of action would protect "teachers and coaches," who themselves were

not the targets of discrimination, but who "are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators." *Jackson*, 544 U.S. at 181, 125 S.Ct. 1497. Outside of the educational context, this is not necessarily true; employees such as Gómez can hardly argue that their co-workers are often in the best position to identify instances of age discrimination and bring it to the attention of supervisors. Finally, the Court stated in *Jackson* that Title IX was adopted in response to the Court's holding in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), in which the Court upheld a cause of action for retaliation for speaking out against race discrimination. *Jackson*, 544 U.S. at 179-80, 125 S.Ct. 1497. Here, there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination. *See, e.g.*, H.R. Rep. 93-913 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2850 (stating only that "[t]he committee expects that expanded coverage under the [ADEA] will remove discriminatory barriers against employment of older workers in government jobs"). Thus, neither the nature of the statute interpreted nor the policies discussed in *Jackson* justify extending its holding to the ADEA.

We also consider the legislative structure in determining congressional intent. *See Doe v. Boston Pub. Schs.*, 358 F.3d 20, 26 (1st Cir.2004). We begin by noting that 29 U.S.C. § 623(d), the parallel ADEA provision governing private employers, does provide an explicit cause of action for retaliation:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a

> charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Chapter.

No equivalent provision exists for federal employees. We generally presume that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (internal citation and quotation marks omitted); *see also Nowd v. Rubin*, 76 F.3d 25, 27-28 (1st Cir.1996). The absence of statutory language providing a claim for retaliation in § 633a, when compared with the explicit prohibition on retaliation in § 623(d), further supports the conclusion that Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers.

Gómez responds that the D.C. Circuit, in *Forman v. Small*, found that the difference between the private and public sector provisions was not dispositive.[1] 271 F.3d 285, 296 (D.C.Cir.2001) The D.C. Circuit suggested that it would be "difficult to imagine how a workplace could be 'free from any discrimination based on age' if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee." *Id.* at 297. As such, they concluded that "[n]othing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace." *Id.*

We must respectfully disagree with our brethren on the D.C. Circuit. First, we note that the proper inquiry is not

---

[1] The issue in *Forman* was not whether § 633a included a substantive cause of action for retaliation, but rather whether sovereign immunity had been waived. 271 F.3d at 296. However, as a precursor to finding a waiver of sovereign immunity in § 633a, the D.C. Circuit found that § 633a provided for a retaliation cause of action.

whether the statute shows that Congress intended to limit the scope of § 633a, but rather whether Congress intended to provide for a retaliation cause of action in § 633a in the first place. *See Iverson v. City of Boston*, 452 F.3d 94, 100 (1st Cir.2006) ("[A] private right of action may be conceived only by a statute that clearly evinces congressional intent to bestow such a right."). Furthermore, although *Forman* relied heavily on the Supreme Court's holding in *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981), *Lehman* expressly adopted the reasoning we apply here, that "Congress . . . demonstrated that it knew how to provide a statutory right . . . when it wished to do so elsewhere in the very 'legislation cited.'" *Id.* at 162, 101 S.Ct. 2698. Finally, we disagree with the D.C. Circuit's conclusion in *Forman* that the similarities between the provisions affecting federal employees in the ADEA and Title VII justify a finding that § 633a contains a retaliation provision. Although we acknowledge that § 633a is "patterned directly after § 717(a) and (b) of the Civil Rights Act of 1964," *Lehman*, 453 U.S. at 167 n. 15, 101 S.Ct. 2698, we see a significant difference between the two statutes. In Title VII, Congress intended for 42 U.S.C. § 2000e-16, the provision applicable to federal employees, to incorporate the provisions applicable to the private sector, including the private-sector anti-retaliation provision. *See, e.g., Ayon v. Sampson*, 547 F.2d 446, 450 (9th Cir.1976) ("[I]t is clear that Congress incorporated the [private-sector] protections against retaliation in its enactment of § 2000e-16."). In stark contrast, the provisions of the ADEA that apply to federal employees state that "[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Chapter." 29 U.S.C. § 633a(f). The court in *Forman* stated that § 633a(f) presents "somewhat of a red herring." 271 F.3d at 298. However, we generally engage the presumption that statutes do not contain surplusage. *Arlington Cent. Sch. Dist. Bd. of Educ. v.*

Murphy, — U.S. —, 126 S.Ct. 2455, 2460, 165 L.Ed.2d 526 (2006). Here, it is quite easy to see why Congress might have included § 633a(f) in the ADEA: it did not want the expansive private-sector provisions of the ADEA extended to federal employees. *See, e.g., Lehman*, 453 U.S. at 162, 101 S.Ct. 2698 (finding that Congress did not intend for § 626(c), which provides for jury trials in private-sector age discrimination suits, to apply to federal employees); *id.* at 168, 101 S.Ct. 2698 ("[Section 633a(f)] clearly emphasized that [§ 633a] was self-contained and unaffected by other sections, including those governing procedures applicable in actions against private employers"); *Nowd*, 76 F.3d at 28 (deciding that § 626(b), which provides for the recovery of attorneys fees in private-sector age discrimination suits, does not apply to federal employees).

Accordingly, we decide that Congress did not intend for 29 U.S.C. § 633a to include a cause of action for retaliation as the result of having filed an age-discrimination related complaint. Because Gómez had no cause of action under § 633a for retaliation against the USPS or Potter, the district court properly dismissed her complaint.

III. *Conclusion*

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
D. PUERTO RICO

No. Civ. 03-2236(DRD)

MIRNA GOMEZ-PEREZ,

Plaintiff,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,

Defendant.

Feb. 28, 2006

OPINION AND ORDER

DOMINGUEZ, J.

Pending before the Court is the defendant, John E. Potter Jr., in his official capacity as Post Master General of the United States of America or the "Postal Service" (USPS) *Motion for Summary Judgment* (Docket No. 43) moving the Court to dismiss plaintiff's claims for alleged age discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and under the Age Discrimination in Employment Act (ADEA). The USPS sustain that there are no issues of material fact hence the Postal Service is entitled to judgment as a matter of law. On November 11, 2005, the instant motion for summary judgment and its related Opposition, Reply and Surreply were referred to Magistrate Judge Gustavo A. Gelpi for a Report and Recommendation (R & R)(Docket No. 62). On January 30, 2006, the Magistrate Judge entered its recommendation wherein it was recommended that the defendant's

motion for summary judgment be granted. (Docket No. 66). On January 31, 2006, plaintiff Mirna Gomez-Perez timely filed her objections to the Magistrate Judge's R & R (Docket No. 68). After considering plaintiff's objections, and reviewing *de novo* the R & R, for the reasons herein stated, the Court GRANTS USPS's *Motion for Summary Judgment* (Docket No. 43).

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The District Court may refer dispositive motions to a United States Magistrate Judge for a Report and Recommendation. 28 U.S.C. § 636(b)(1)(B) (1993); Fed.R.Civ. P. 72(b); Local Civil Rule 72(a), District of Puerto Rico. *See Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). Of course, an adversely affected party may contest the Magistrate's report and recommendation by filing its objections within ten (10) days after being served a copy thereof. *See*, Local Civil Rule 72(d); Fed.R.Civ. P. 72(b). Moreover, 28 U.S.C. § 636(b)(1), in pertinent part, provides that:

> Within ten days of being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

See 28 U.S.C. § 636(b)(1).

However, pursuant to Fed.R.Civ. P. 72(b), "[a]bsent objection by the plaintiffs, the district court had a right to assume that plaintiffs agreed to the magistrate's recommendation." *Templeman v. Chris Craft Corp.*, 770 F.2d 245,

247 (1st Cir.1985), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 556 (1985). Moreover, "[f]ailure to raise objections to the Report and Recommendation waives that party's right to review in the district court and those claims not preserved by such objection are precluded on appeal." *Davet v. Maccarone*, 973 F.2d 22, 30-31 (1st Cir.1992). *See also Henley Drilling Co. v. McGee*, 36 F.3d 143, 150-151 (1st Cir.1994) (holding that objections are required when challenging findings actually set out in magistrate's recommendation, as well as magistrate's failure to make additional findings); *Lewry v. Town of Standish*, 984 F.2d 25, 27 (1st Cir.1993) (stating that "[o]bjection to a magistrate's report preserves only those objections that are specified"); *Keating v. Secretary of H.H.S.*, 848 F.2d 271, 275 (1st Cir.1988); *Borden v. Secretary of H.H.S.*, 836 F.2d 4, 6 (1st Cir.1987) (holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised"). *See generally United States v. Valencia*, 792 F.2d 4, 6 (1st Cir.1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir.1980).

Provided plaintiff, Mirna Gomez-Perez has objected to the determinations addressed by the Magistrate Judge, the Court shall make a *de novo* determination of the R & R.

MOTION FOR SUMMARY JUDGMENT

The standard for summary judgment has been revisited by the First Circuit Court of Appeals on several occasions. *Serapion v. Martinez*, 119 F.3d 982, 986 (1st Cir.1997), (*citing McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.1995))(collecting cases); *Coyne v. Taber Partners I*, 53 F.3d 454, 457 (1st Cir.1995)(same). A court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

To determine whether these criteria have been met, a court must pierce the boilerplate of the pleadings and carefully review the parties' submissions to ascertain whether they reveal a trial worthy issue as to any material fact. *Perez v. Volvo Car Corporation*, 247 F.3d 303, 310 (1st Cir.2001); *Grant's Dairy-Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 14 (1st Cir.2000); *Cortes-Irizarry v. Corporation Insular*, 111 F.3d 184, 187 (1st Cir.1997). A fact is "material" if it potentially could affect the suit's outcome. *Id.* An issue concerning such a fact is "genuine" if a reasonable factfinder, examining the evidence and drawing all reasonable inferences helpful to the party resisting summary judgment, could resolve the dispute in that party's favor. *Id.* At the summary judgment stage, the trial court examines the entire record "in the light most flattering to the nonmovant and indulges all reasonable inferences in that party's favor. Only if the record, viewed in the manner and without regard to credibility determinations, reveals no genuine issue as to any material fact may the court enter summary judgment." *See Cadle Company v. Hayes*, 116 F.3d 957, 959-60 (1st Cir.1997).

The summary judgment machinery operates in two phases. First, the movant must make a preliminary showing that there is no genuine issue of material fact which requires resolution in the crucible of trial. Once this showing has been made, the burden shifts to the nonmovant to demonstrate, through specific facts, that a trialworthy issue remains. *Id.*

In applying the standard, the court must construe the record and all reasonable inferences from it in favor of the nonmovant (the party opposing the summary judgment motion). *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 53 (1st Cir.2000); *Cortes-Irizarry*, 111 F.3d at 187; *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). An absence of evidence on a critical issue weighs against the party—be it the movant or the nonmovant—who

would bear the burden of proof on that issue at trial. *Perez*, 247 F.3d at 310; *see also Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35-36 (1st Cir.1998); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir.1990). Defendants must not only show that there is "no genuine issue of fact," but also that they are "entitled to judgment as a matter of law." *Vega v. Rodriguez Puerto Rico Telephone Co.*, 110 F.3d 174, 178 (1st Cir.1997).

Fed.R.Civ.P. 56 does not ask which party's evidence is more plentiful, or better credentialed, or stronger weighted, because at the summary judgment stage, the Court may not weigh the evidence. *Cortez-Irizarry*, 111 F.3d at 187; *see also Casas Office Machines, Inc. v. Mita Copystar America, Inc.*, 42 F.3d 668 (1st Cir.1994). Summary judgment "admits no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." *Id.* (*citing Greensburg v. Puerto Rico Maritime Shipping Authority*, 835 F.2d 932, 936 (1st Cir.1987)).

The Court must review the record "taken as a whole," and "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). This is so, because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* "The Court should give credence to the evidence favoring the nonmovant as well as the evidence supporting the moving party that is contradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*

Similarly, unsettled issues of motive and intent as to the conduct of any party—as may arise in actions under §§ 1983 and 1985—will normally preclude the Court from granting summary judgment. *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 677 (1st Cir.1996) (reversing summary judgment and

emphasizing that "determinations of motive and intent . . . are questions better suited for the jury") (internal quotation marks omitted) (citation omitted); *see also Tew v. Chase Manhattan Bank, N.A.*, 728 F.Supp. 1551, 1555 (S.D.Fla.1990) ("Certain issues such as fraud, intent, and knowledge lend themselves to trial, rather than summary judgment. These matters can often only be proved by reliance upon circumstantial evidence except in the rare case where there is uncontroverted proof of a 'smoking gun.'"). However, "even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences [or] unsupported speculation." *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir.1996).

FACTUAL AND PROCEDURAL BACKGROUND

The facts to the instant case have been vastly discussed in the several motions and counter motions filed by both parties. However, none of the parties have opposed the factual background as set forth in the Magistrate Judge's R & R hence, the Court deems that the facts as stated in the R & R are uncontroverted facts for disposition at the summary judgment stage.[1]

---

[1] The Court notes that plaintiff's *Objections to the Magistrate Judge's Report and Recommendation* (Docket No. 68) moves the Court to admit and add certain facts to the Magistrate Judge's R & R which were unchallenged and admitted by defendant hence could be crucial, should as plaintiff contends, sovereign immunity has been waived under § 633(a). Plaintiff avers that these facts must be included as uncontroverted facts should the Court reject the Magistrate Judge's recommendation to dismiss plaintiff's retaliation claims rather than addressing the merits of said claim. The facts to be added as requested by plaintiff are the following:

> 1) Shortly after plaintiff had filed an EEO complaint, plaintiff's supervisors, Rivera and Ciutron met at a quarterly management meeting. In said meeting Rivera informed Cintron that plaintiff had filed an EEO administrative complaint.

Plaintiff, Mirna Gomez-Perez is within the protected class for purposes of an ADEA claim. She began working with the USPS in New York on or about March 1987. After a reassignment to the Caribbean District, in or about July 1997, plaintiff was transfer [sic] to the Dorado station in a "mutual swap" of stations with a Dorado employee. Plaintiff then worked at the Dorado station from July 5, 1997 throughout November 2, 2002, occupying a full-time regular position as a Window Distribution Clerk under the supervision of Post Master Onell Rivera (Rivera).

Due to certain medical conditions suffered by plaintiff's mother, on or around October 24, 2002, plaintiff requested a transfer to a part-time flexible position as a Window Distribution Clerk at the Moca Post Office. However, Rivera attempting to convince plaintiff to remain at her post in the Dorado Post Office, advised plaintiff to reconsider the requested change as she was changing into a part-time flexible position which did not encompass a guaranteed forty hour work schedule and that the requested transfer was not temporary in nature. On November 2, 2002, plaintiff's transfer was approved and she began work in the Moca Post Office as a part-time Flexible Window Sales Associate. Plaintiff's supervisor was Post Master Jose Antonion Cintron, who was reassigned in January 2003 to the Sabana Grande Post Office but remained supervising the Moca Post Office

---

2) Ramos, Cintron, Mr. Ruben Muñoz(shop steward), and Mr. Ricardo Morales were present during the March 5, 2003 meeting.

3) At the March 5, 2003 meeting, Cintron took notes and prepared a list of 8 accusations allegedly discussed with plaintiff that day in Cintron's office.

4) Only a few days had elapsed between the quarterly management meeting and the March 5, 2003 meeting.

5) After the March 5, 2003 meeting, Cintron ordered Mr. Hector Hermida not to assign plaintiff more than six hours of work each day.

until a new Post Master was hired. While being employed at the Moca station, on March 5, 2003, plaintiff was subjected to a pre-disciplinary talk by the plaintiff's area cluster leader Mr. Heriberto Ramos at Cintron's request. The meeting focused on complaints received by male co-workers stating that they felt sexually harassed by plaintiff's way of greeting male employees by a kiss in the cheek.

Parallel to the transfer request initiated by plaintiff, on October 30, 2002, another postal employee, Ivette Claudio requested to be reassigned from the Air Mail Facility to the Dorado Post Office. On November 6, 2002, Dorado's Post Master, Rivera, informed Ms. Ivette Claudio the availability of a part-time flexible position within the Dorado Post Office. Such part-time flexible position availability within the Dorado Post Office resulted from Rivera informing on November 22, 2002, the President of the Local Union the vacancy created by Gomez's transfer to the Moca station and Rivera's intention to revert Gomez's vacancy from a full-time position to a part-time flexible position. Further, Rivera informed the President of the Local Union the process to be followed in order to complete the reversion.

Notwithstanding plaintiff had been transferred to the Moca Post Office at her own request on November 2, 2002, shortly thereafter on November 27, 2002, Rivera confirmed by letter a previous telephone conversation he had with plaintiff requesting her to put into writing her request to return to the Dorado Post Office, the reasons for plaintiff's request and plaintiff's availability to work in a part-time position. In said letter, Rivera further informed plaintiff that there was a written commitment with another employee to fill the flexible part-time position and that said commitment was pending final approval by the District Office. On that same date, November 27, 2002, plaintiff filed a grievance procedure with the Union relating to the transfer request to the Dorado postal station. Said grievance procedure was ultimately denied.

On February 22, 2003, plaintiff filed an administrative procedure before the EEOC against the Postal Service alleging age discrimination, specifically against Rivera. In her EEOC charge, plaintiff alleged that Rivera took advantage of the opportunity to get rid of her because she was not able to work with packages, and that plaintiff believed that because Claudio was younger than plaintiff, Rivera rather wanted her as an employee.

On November 18, 2003, plaintiff filed the instant case against her employer, the USPS, alleging age discrimination and retaliation pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.*, and presumably under ADEA. Plaintiff alleges that: 1) she was discriminated because of her age; 2) that her position was granted to an employee younger in age and with less experience than plaintiff; and 3) that age was the determinative factor at the time her request to be rehired at her formal workplace was denied and in the transfer of a younger, and with less working experience postal employee to plaintiff's former position. Further, plaintiff avers that after filing an EEOC administrative charge, the USPS in retaliation thereof denied her request to be transferred to her prior workplace, reduced her working shift, and subjected her to humiliation.

Defendant's motion for summary judgment sustains that plaintiff's claims should be dismissed inasmuch plaintiff has failed to establish a *prima facie* case of age discrimination and retaliation consequently, it is unable to support the discrimination claims alleged in the complaint. Plaintiff countered focusing mainly in its retaliation claim and failing to address the arguments relating to the age discrimination claim. The defendant Replied [sic] to plaintiff's opposition and raised new arguments of law centered in the position that the Government has not waived its sovereign immunity to be sued under ADEA for retaliatory [sic] hence plaintiff's retaliation claims should be dismissed. Plaintiff surreplied

alleging precisely the contrary, to wit, that the Government has waived its immunity. The Court notes that both parties have submitted jurisprudence from other sister courts. However, in the realm of the First Circuit, the issue constitutes a matter of first impression.

APPLICABLE LAW AND LEGAL ANALYSIS

I. ADEA CLAIMS

At the outset, the Court notes that plaintiff has not objected the conclusion reached by the Magistrate Judge in its R & R as to plaintiff not developing an argument opposing the defendant's request to dismiss plaintiff's ADEA claims. Furthermore, the Magistrate Judge recommended that plaintiff's ADEA claims should be dismissed because, in its opinion, plaintiff had failed to establish a *prima facie* case.

Notwithstanding, the Court notes that plaintiff's objection states that ". . . it does not object to all the Magistrate Judge's conclusion with respect to what is labeled as 'Age Discrimination Claims' under Section B, since a reading of Plaintiff's motions in opposition to summary judgment show that plaintiff had waived other claims of discrimination under ADEA, effectively reducing her case to a discrimination on age based entirely on retaliatory types of discrimination". (Docket No. 68, Objections to the Magistrate Judge's Report and Recommendation, P.1-2). The Court deems that plaintiff has expressly abandoned its non-retaliatory substantive ADEA claims and has acquiesced to the Magistrate Judge's recommendation to grant the Government's request for dismissal. Therefore, the Court does not have to conduct a review under the plain error standard because plaintiff has *de facto* withdrawn its ADEA claims. Consequently, the Magistrate Judge's Report and Recommendation is ADOPTED and plaintiff's ADEA claims against the defendant is hereby DISMISSED WITH PREJUDICE.

II. ADEA RETALIATION CLAIMS

The Magistrate Judge's R & R concluded that plaintiff's retaliation claims under ADEA should be dismissed because, as stated previously, the United States has not waived its sovereign immunity thus, retaliation claims under ADEA are not actionable under § 633(a). The Magistrate Judge clearly stated the well established rule within the federal jurisprudence that the United States may not be sued unless a specific federal statute expressly authorizes the suit. The Magistrate Judge specifically noted that ADEA, when invoked in the private employment sector, prohibits retaliation against employees complaining of discrimination under ADEA § 623(d). However, the Magistrate Judge noted that the language of the federal counterpart does not allow retaliation claims under ADEA § 633a(a).

Plaintiff's timely objected the conclusions reached by the Magistrate Judge and reiterated its argument under the waiver of immunity doctrine as set forth in *Forman v. Snell*, 271 F.3d 285 (D.C.Cir.2001), *cert. denied*, 536 U.S. 958, 122 S.Ct. 2661, 153 L.Ed.2d 836 (2002). Specifically, plaintiff objects to the Magistrate Judge labeling the *Forman* opinion as a "perceived breadth" analysis and sustains that the *Forman* Court concluded that under § 633(a) the waiver of sovereign immunity is expressed rather than implied. Further, plaintiff sustains that the reasoning set forth in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) is fully applicable to the instant case, but it was not brought to the attention of the Magistrate Judge because the case, unbeknownst to counsel, dealt with other anti-discrimination statute [sic]. Moreover, plaintiff sustains that *Jackson's*, definition of "discrimination" controls the instant controversy and supports the view of the *Forman* court inasmuch the plain meaning of "discrimination" in both cases is identical. Counsel for plaintiff affirms that under the *Jackson* court analysis, a statute does not have to contain the express use of

the word "retaliation" in order to encompass a prohibition of retaliation.[2]

It is settled law within the federal jurisprudence that the standard to determine whether sovereign immunity has been waived is demanding. *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999)(*citing Lane v. Pena,* 518 U.S. 187, 192-193, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). Further, waivers are to be narrowly construed in favor of the sovereign and the ambiguities are to be construed against waiver. *Orff v. United States*, 545 U.S. 596, 125 S.Ct. 2606, 2610, 162 L.Ed.2d 544 (2005); *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995). Accordingly, a waiver of federal sovereign immunity must be unequivocally expressed in the statutory text. *Lane v. Pena*, 518 U.S. at 192. In summary, the general principle is that the United States cannot be held as having entered consent to be sued without an express and unequivocal statutory waiver. As stated by the Supreme Court, "[t]he corollary to this settled principle is that a waiver of sovereign immunity may not be implied; nor can '[a] statute's legislative history . . . supply a waiver that does not appear clearly in any statutory text'". *Lane v. Pena*, 518 U.S. at 192.

The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer, including a State, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age". 29 U.S.C. § 623(a)(1). It was not until 1974 when § 633a was put into effect, that ADEA coverage was extended to federal employees creating an

---

[2] *Jackson's* discrimination and retaliation analysis was performed within personal causes of action filed pursuant to Title IX. The *Jackson* court determined that retaliation is a form of discrimination because the complainant has been subjected to differential treatment resulting from the initial complaint.

exclusive remedy for age discrimination in federal employment. *Christie v. Marston*, 451 F.Supp. 1142 (N.D.Ill. 1978).[3] Consequently, the federal government has consented to be sued in federal court for such actions arising from discriminatory acts against federal employees because of the employee's age.

Further, an ADEA retaliation claim does not have as a prerequisite that plaintiff previously prevailed in the underlying substantive ADEA claim. *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir.1994). Notwithstanding, the issue of law before the Court is to determine whether a plaintiff may file a retaliation claim because of discriminatory conduct resulting from its age under § 633a(a). In other words, does the language within § 633a(a) include, impliedly or expressly, a waiver to sovereign immunity thus, the federal government may be sued for retaliation claims under ADEA. The matter has not been entertained in our Circuit Court of Appeals.

At the outset, the Court notes that § 633a(f) provides that "[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section". As stated by the Magistrate Judge this is "an exclusivity clause that limits application of any

---

[3] In its relevant parts, § 633a(a) provides that: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments, . . . in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units in the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age".

further provision of the chapter to the section affecting federal employers". Hence, the discrimination form of retaliation contained within the applicable statutory scheme for the private sector in § 623(d) does not apply to federal employees because § 633a(f) excludes the application of any other section within ADEA, and because under ADEA's § 623(d), the federal government is excluded from the definition of employer.[4]

Plaintiff avers that the doctrine expressed in *Forman v. Small*, constitutes a cogent well expressed argument finding a waiver for retaliation claims under ADEA against a federal employer contained at § 633a(a). The *Forman* court concluded that the broad, sweeping and plain language within § 633a(a), referring to "any discrimination" based on age, advances the purpose of the statute to the effect that a "work place cannot be free from any age discrimination if an employer can take an adverse employment action against its employees because the employee has brought an age discrimination claim against the employer". *Forman v. Small*, 271 F.3d at 298-299. The Court reasoned that ADEA statutory differences amongst the federal and private sectors were not dispositive of the issues as determined by other sister courts because although § 633a(f) precludes adoption of other sections within ADEA to federal employment, the statute's unqualified language encompasses a claim for retaliation because "analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor". *Forman v. Small*, 271 F.3d at 297(citations omitted). The Court proceeded to conclude that the language of § 633a cannot be read to suggest "that Congress intended the federal workplace to

---

[4] In its relevant parts, § 623(d) provides that: "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge, . . . or participated in any manner in an investigation, proceeding, or litigation under the [ADEA].

be less free of age discrimination than the private sector" because otherwise "absurd results" would follow.

Performing an examination of § 633a(a)'s legislative history, the *Forman* Court noted that Congress' intent when enacting the statute was "to remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as [ADEA] has and continues to do in private employment". *Forman v. Small*, 271 F.3d at 297(citations omitted). Further, as to the exclusivity language contained within § 633a(f), the *Forman* court determined that said language does not preclude a determination that the waiver was expressly contained within the statute, as opposed to § 623(d) wherein a retaliation cause of action is contained *ad verbatim*, because it was not borrowing provisions from elsewhere in the ADEA statutory framework. Rather, the court relied on the broad language of § 633a(a) interpreting that there cannot be a work place free from age discrimination if the employer is free to adverse employment action against the employee because the employee had initiated a claim against its employer for age discrimination, said action being precluded under § 633a(a).

To reach its ultimate conclusion, the *Forman* court examined previous Fifth Circuit jurisprudence comparing by analogy the language contained within § 633a(a) and 42 U.S.C. § 2000e-16 wherein Congress waived sovereign immunity for Title VII claims to include a claim for retaliation. The relevant jurisprudence examined by the *Forman* court compared § 2000e-16's language with that of 42 U.S.C. §§ 2000e-3 and 2000e-4, and determined that the latter was narrowly drawn and prohibited certain types of discrimination while § 2000e-16's language was drafted broadly enough to prohibit any type of discrimination, to wit, those considered

in §§ 2000e-3 and 2000e-4, and any other as well.[5] Then, the *Forman* court examined the language of § 633a(a) and § 2000e-16 and concluded that both statutes were drafted using identical language creating a cause of action for federal employees under ADEA and Title VII. Consequently, these statutes should be interpreted consistently.

Finally, the *Forman* court ignored other sister court's reasoning as to the exclusivity provision contained in § 633a(f). The court concluded, as stated previously, that the broad and sweeping language within § 633a(f) allowed any type of

---

[5] In its relevant parts, 42 U.S.C. § 2000e-16 provides:

> Discriminatory practices prohibited; employees or applicants for employment subject to coverage
>
> All personnel actions affecting employees or applicants for employment . . . in military departments, . . . in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units in the Government of the District of Columbia having positions in the competitive service, and in those units in the judiciai branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

In turn, 42 U.S.C. § 2000e-3 reads as follow [sic]:

> Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

discriminatory conduct, including retaliation, because its legislative history did not suggest a limitation as to the broad scope of coverage of § 633a as originally intended, and secondly, because it was not borrowing other provisions within ADEA.[6]

The Government's argument before the Magistrate Judge sustains the thesis that the language contained in § 633a(a) does not amount to a waiver of immunity. The Government relied in [sic] jurisprudence from other sister courts, to wit, *Cyr*[7] and *Mineta*[8]. The *Cyr* court examined the *Forman* and the *Bornholdt* rulings and deemed the rulings as unpersuasive because an analysis based on the perceived breadth of the statute was contrary to the Supreme Court's requirement that a waiver of immunity be expressed in unequivocal statutory language. The *Cyr* Court determined that the sister courts' reasoning in *Forman* failed inasmuch the statutory language provided by Congress within § 633a(a) failed to provide a retaliation cause of action nor expressly and unequivocally provided a waiver of sovereign immunity. Finally, the *Cyr* court concluded that it is not "proper to infer a waiver based on the breadth of the statutory language or speculations about congressional intent [because] such inferences and speculations have no place in federal sovereign immunity law". *Cyr v. Perry*, 301 F.Supp.2d at 534 (*citing Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *Research Triangle Inst. v. Bd. of Governors of the Federal Reserve Sys.*, 132 F.3d 985, 987 (4th Cir.1997)).

---

[6] The D.C. Circuit Court noted that in *Bornholdt v. Brady*, 869 F.2d 57, 63 (2nd Cir.1989) *in dictum* the Second Circuit observed that the government waived sovereign immunity for ADEA retaliation claims.

[7] *Cyr v. Perry*, 301 F.Supp.2d 520 (E.D. Virginia 2004).

[8] *Whitman v. Mineta*, 382 F.Supp.2d 1130 (D.Alaska 2005).

Distinguishing the conclusion reached in *Forman*, the *Cyr* Court reasoned that "there is no reasonable grounds to conclude that 'retaliation' is a form of 'discrimination based on age' because, as noted, retaliation is a different claim with different elements and can be established without a showing of age animus". *Cyr v. Perry*, 301 F.Supp.2d at 532. Furthermore, after examining regulations containing express language providing a cause of action for retaliation under ADEA claims expressly waiving the sovereign immunity, the *Cyr* Court restated the well established principle that federal regulations cannot supply a waiver rather, the waiver must be found explicitly and unequivocally in the statute. *Cyr v. Perry*, 301 F.Supp.2d at 532-534.

Finally, the *Cyr* court determined that the Government has not waived its immunity for retaliation claims under ADEA by means of merely comparing said statute with waiver of immunity under Title VII claims pursuant to 42 U.S.C. § 2000e-16, prohibiting discrimination by federal employer. The Court reasoned that § 2000e-16 allowed incorporating language from other provisions of the statute that expressly and unequivocally prohibited retaliation however, said course of action is precluded by the exclusivity clause at § 633a(f).

Similarly, in *Whitman v. Mineta*, the Court examined other sister courts' decisions addressing whether ADEA's language contains a waiver of immunity. As to the *Forman* court's ruling, *Whitman* concluded that the analysis performed in the former inferred an implied immunity waiver since the language lacked an express waiver. *Whitman v. Mineta*, 382 F.Supp.2d at 1134. The *Mineta* court joined the analysis performed in *Cyr* concluding that the breadth of § 633a(a) does not necessarily indicate an intent to encompass retaliation since the claim and burden of proof of an ADEA cause of action is different from those of a retaliation claim. *Whitman v. Mineta*, 382 F.Supp.2d at 1135.

Furthermore, in *Mineta* the court reasoned that to determine whether the language of the statute contains evidence of an immunity waiver being in effect, the language, purpose and history of the statute must be examined. Having examined the statutory language and reaching identical conclusion [sic] as in *Cyr,* the *Mineta* court proceeded to examine the second and third sources of potential evidence of waiver. As to the purpose of the ADEA, *Mineta* determined that it is three-folded, to wit, to promote employment of older persons based on their agility rather than age; to prohibit arbitrary age discrimination in employment; and to help to promote ways of solving problems arising from the impact of age on employment. *Mineta*, 382 F.Supp.2d at 1135. The court reasoned that since the statute's purpose lacked any reference to include protection from employer retaliation, the intent to include reprisal protection was obviated. Likewise, examining the history of the statute, the court concluded that there was lack of persuasive evidence of a waiver because at the time § 633a(a) was enacted the applicable provisions to the private sector were already in place, and Congress openly avoided extending its application to federal employment. Hence there is an express exclusion of a statutory disposition previously expressly included by Congress applicable to the private industry. Finally, *Mineta* also determined that the language of the exclusivity provision in § 633a(f) evidences that no other provision within ADEA could logically be invoked against a federal employer specifically, the provision relating to the express prohibition of retaliation in the private sector pursuant to § 623(d).

Having expressed the legal background, and pursuant to the relevant Supreme Court and the First Circuit jurisprudence, the Court must determine whether § 633a(a)'s language contains an implied or express waiver of immunity. Addressing firstly, the language typically used for express waivers as compared to the language provided in § 623(d) it is evident that no express waiver is provided for retaliation

claims within federal employment. As to whether an implied waiver does in fact exists [sic], as stated previously, the controversy is an issue of first impression within the First Circuit's district courts.

The Court is conscious of the well settled principle that waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statute and will not be implied. *Lane v. Pena*, 518 U.S. at 192 (citations omitted). Likewise, a waiver of immunity shall be strictly construed, in terms of its scope, and further instances of ambiguity must be decided in favor of the sovereign immunity. *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995); *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). Similarly, when the Government consents to be sued, the limitations and conditions of said consent must be strictly observed and exceptions are not to be implied. *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Furthermore, the Supreme Court has also ruled that a statute's legislative history cannot provide the unequivocal waiver that must clearly appear in the statutory text. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Therefore, in order to sustain that the Government has consented to be sued for retaliation under ADEA, the waiver of immunity must extend unambiguously to such retaliation claims.

In the First Circuit the doctrine of sovereign immunity has been narrowly constructed as well. For instance, it has been clearly established that ADEA plaintiffs under § 633a are not entitled to jury trials as their private sector counterparts. *Nowd v. Rubin*, 76 F.3d 25, 27 (1st Cir.1996)(*citing Lehman v. Nakshian*, 453 U.S. 156, 160-161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Likewise, the First Circuit has refused to grant attorneys fees under § 633a(c) allowing such equitable remedies that will effectuate the purposes of ADEA because

the Act failed to make express reference to award attorney's fees against the United States contrary to its private sector counterpart incorporating explicit incorporation under the Fair Labor Standards Act § 216(b). *Nowd v. Rubin*, 76 F.3d at 27.

Thus, the undersigned is bound to comply with the applicable jurisprudence of the appellate court and conclude that unless there is express language providing a waiver of sovereign immunity, the United States cannot be sued for retaliation claims under ADEA's § 633a(a). Further, the Court notes that the First Circuit court has acknowledge [sic] that under § 633a there is no prerequisite to exhaust administrative procedures before initiating a suit in federal court contrary to claims under Title VII and claims pursuant to 42 U.S.C. § 2000e-16. *Lavery v. Marsh*, 918 F.2d 1022, 1025 n. 4 (1st Cir.1990).[9] Consequently, plaintiff's analogy with 42 U.S.C. § 2000e-16 fails.

Finally, plaintiff's recognize that in the arguments previously presented before the Magistrate Judge they failed to incorporate discussion relating *Jackson v. Birmingham Bd. of Education*. Notwithstanding, plaintiff move [sic] the Court to consider said arguments in their objections to the R & R. However, it is known that arguments not raised before a Magistrate Judge are deemed waived and the party failing to

---

[9] The Court notes that in *Lavery* the appellate court borrowed Title VII's statute of limitations to bring forth a claim under ADEA § 633a because the statute itself was silent as to the proper statute of limitations for such claims. However, one matter is to borrow a statute of limitations, and the other is to waive sovereign immunity in absence of express language and in presence of a self-contained scheme defining the remedial limits of federal government liability under the ADEA. After all, "the waivers of sovereign immunity are to be strictly construed in favor of the United States and 'must not be enlarged beyond such boundaries as [the statute's] language plainly requires". *Nowd v. Rubin*, 76 F.3d at 27 (*citing United States v. Horn*, 29 F.3d 754, 762 (1st Cir.1994))(emphasis added).

raise such issue is not entitled to a *de novo* review. *Borden v. Secretary of H.H.S.*, 836 F.2d at 6(holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised"). *See generally United States v. Valencia*, 792 F.2d 4, 6 (1st Cir.1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir.1980). It is known that a party must take before the Magistrate Judge "not only their 'best shot' but all of their shots". *Singh v. Superintending School Committee*, 593 F.Supp. 1315, 1318 (D.Me.1984). Consequently, plaintiff's request that this Court consider *Jackson* fails.

CONCLUSIONS

For the reasons stated herein, the Court ADOPTS *in toto* the Magistrate Judge's Report and Recommendation (Docket No. 66) GRANTS USPS's *Motion for Summary Judgment* (Docket No. 43) and hereby DISMISSES plaintiff's ADEA claims and plaintiff's retaliation claims under ADEA against all defendants WITH PREJUDICE. Judgment shall be entered.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1614

MYRNA GOMEZ-PEREZ,
Plaintiff-Appellant,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Defendant-Appellee.

Before

Boudin, *Chief Judge,*
Torruella, Baldock, Lynch,
Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: March 20, 2007

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:

MARGARET CARTER
Chief Deputy Clerk

APPENDIX D

STATUTE

29 U.S.C. § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will

effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.